

1 LAWRENCE J. KING (CSB #120805)
2 6 "C" STREET
3 PETALUMA, CA 94952
4 PHONE: (707) 769-9791
5 FAX: (707) 769-9253

4 ATTORNEY FOR PLAINTIFF
VAN A. PENA, PHD., M.D.

**THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

9 **VINCENT OBIAJULU,**
10 **Plaintiff,**
11 **v.**
12 **SAN MATEO PROBATION**
13 **DEPARTMENT,**
14 **Defendant.**

S CASE NO. C 07-3870 CW
S
S PLAINTIFF'S STATEMENT OF NON-
S OPPOSITION TO DEFENDANT'S
S MOTION FOR A MORE DEFINITE
S STATEMENT, STATEMENT OF NON-
S OPPOSITION TO DEFENDANT'S
S MOTION TO STRIKE THE PRAYER
S FOR PUNITIVE DAMAGES, AND
S OPPOSITION TO DEFENDANT'S
S MOTION TO STRIKE "TIME-BARRED
S ALLEGATIONS" AND OPPOSITION
S TO DEFENDANT'S MOTION TO
S DISMISS.

S Hearing Date: December 13, 2007
S Hearing Time: 2:00 p.m.
S Courtroom: 2, 4th Floor
S
S (The Honorable Claudia Wilken)

TABLE OF CONTENTS

I.	PLAINTIFF'S STATEMENT OF NON-OPPOSITION TO DEFENDANTS MOTION FOR A MORE DEFINITE STATEMENT	- 4 -
II.	PLAINTIFF'S STATEMENT OF NON-OPPOSITION TO DEFENDANT'S MOTION TO STRIKE THE PRAYER FOR PUNITIVE DAMAGES	- 4 -
III.	PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO STRIKE "TIME-BARRED ALLEGATIONS."	- 4 -
IV.	PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS.	- 6 -
	A. The Legal Standard for a 12(b)(6) Motion To Dismiss.	- 6 -
	B. Plaintiff's "Time-Barred Allegations" Bear On His Discrimination Complaints.	- 6 -
	C. Plaintiff Pled Sufficient Facts to State A <i>Prima Facie</i> Claim of Discrimination.	- 7 -
	D. Plaintiff Pled Sufficient Facts to State a <i>Prima Facia</i> Claim for Retaliation..	- 8 -
	E. Plaintiff Received Two "Right-to-sue" Letters from the DFEH.	- 8 -
V.	CONCLUSION.	- 9 -

TABLE OF AUTHORITIES

FEDERAL CASES

3	<i>Bennett v. Schmidt</i> , 153 F3d 516, 518 (7th Cir. 1998)	- 6 -
4	<i>Cauchi v. Brown</i> , 51 F.Supp.2d 1014, 1016 (E.D. CA. 1999)	- 6 -
5	<i>Clegg v. Cult Awareness Network</i> , 18 F.3d 752, 754 (9 th Cir. 1994)	- 6 --8 -
6	<i>Gilligan v. Jamco Develop. Corp.</i> , 108 F.3d 246, 249 (9th Cir. 1997)	- 6 -
7	<i>Lyons v. England</i> , 307 F.3d 1092, 1109 (9 th Cir. 2002)	- 5 -, - 7 -
8	<i>National R.R. Passenger Corp. v. Morgan</i> 536 U.S. 101, 113, 122 S.Ct. 2061, 2072 (2002)	- 5 -, - 6 -
9	<i>United Air Lines, Inc. v. Evans</i> , 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977). .	- 5 -, - 6 -
10	<i>United States v. Redwood City</i> 640 F2d 963, 966 (9th Cir. 1981)	- 6 -
11	<i>United States v. White</i> , 893 F.Supp. 1423, 1428 (C.D. CA. 1995)	- 6 -

FEDERAL STATUTES

Rule 12(b) of the Federal Rules of Civil Procedure	- 6 -
Rule 12(e) of the Federal Rules of civil Procedure	- 6 -
Rule 12(f) of the Federal Rules of Civil Procedure	- 4 -
Rule 403 of the Federal Rules of Evidence	- 5 -

1 **I. PLAINTIFF'S STATEMENT OF NON-OPPOSITION TO
2 DEFENDANTS MOTION FOR A MORE DEFINITE STATEMENT.**

3 Plaintiff does not oppose Defendant's motion for a more definite statement. In fact,
4 Plaintiff's counsel offered to stipulate to amend Plaintiff's complaint to address each of the issues
5 raised in Defendant's motion. *See* Declaration of Lawrence J. King ("King Decl."). Defendant's
6 counsel rejected Plaintiff's offer, first insisting that Plaintiff's counsel provide Defendant's counsel
7 a copy of the stipulation, then insisting that Plaintiff's counsel provide Defendant's counsel a copy
8 of the proposed amended complaint, and, finally, insisting that this matter be decided by the Court.
9

10 Concurrent with this pleading, Plaintiff is filing a Motion To Amend that provides the
11 clarification that Defendant requested and addresses each of the other issues raised in Defendant's
12 motion for which this Court could possibly provide relief. The amended complaint:
13

- 14 1. Alleges specific incidents of discrimination and retaliation in 2005 and 2006 (i.e.
15 within the requisite statute of limitations period);
16
- 17 2. Alleges the requisite jurisdictional facts in support of Plaintiff's California Fair
18 Employment & Housing Act ("FEHA") claims (i.e. that he filed two FEHA charges and received
19 "right-to-sue" letters concerning each);
20
- 21 3. Eliminates the claim for gender discrimination; and
22
- 23 4. Eliminates the prayer for punitive damages.
24

25 **II. PLAINTIFF'S STATEMENT OF NON-OPPOSITION TO
26 DEFENDANT'S MOTION TO STRIKE THE PRAYER FOR PUNITIVE DAMAGES.**

27 Plaintiff does not oppose Defendant's motion to strike the prayer for punitive damages.
28 Concurrent with this pleading, Plaintiff is filing a Motion To Amend, with a proposed amended
complaint that eliminates the prayer for punitive damages.

29 **III. PLAINTIFF'S OPPOSITION TO
30 DEFENDANT'S MOTION TO STRIKE "TIME-BARRED ALLEGATIONS."**

31 Defendant asks this Court to strike "the time-barred allegations in the complaint." *See e.g.*
32 Def's Mot. 1:8-9. However, as Defendant admits in its motion, Rule 12(f) only permits the Court
33 to strike "redundant, impertinent or scandalous matter" which "could have no possible bearing on
34

1 the subject matter of the litigation.” Def’s Mot5:23-26. The “time-barred” allegations of
 2 discrimination and retaliation in this case clearly are not “redundant, impertinent or scandalous.”
 3 Moreover, they clearly have bearing on the subject of this litigation.

4 As the United States Supreme Court noted in *National R.R. Passenger Corp. v. Morgan* 536
 5 U.S. 101, 113, 122 S.Ct. 2061, 2072 (2002) an employee may use the prior time-barred acts of
 6 discrimination as background evidence in support of a timely claim. The Ninth Circuit Court of
 7 Appeals, in turn, explained that “the *Evans* majority¹ indicated that a discriminatory act for which
 8 the employer's liability is time-barred “may constitute relevant background evidence in a proceeding
 9 in which the status of a current practice is at issue.” *Lyons v. England*, 307 F.3d 1092, 1109 (9th Cir.
 10 2002). The *Lyons* court then went on to examine what standard should govern the admissibility of
 11 prior acts of discrimination in a case such as this. *Id* at 1110-113. As part of its analysis, the *Lyons*
 12 court pointed out that, in the context of a race-based failure-to-promote claim, evidence occurring
 13 outside the limitations period that the employer had rejected, on the basis of race, candidates for
 14 promotion is probative of the employer's discriminatory intent. *Id* at 1111, fn. 12. Likewise, the
 15 *Lyons* court noted that, in the context of a race-based failure-to-promote claim, evidence occurring
 16 outside the limitations period that the employer or its agent made a single derogatory racial remark
 17 to the plaintiff may be admitted as relevant evidence of the employer's present discriminatory intent.
 18 *Id* at 1111, fn. 12.

19 While this Court eventually may “be required to engage in a *Rule 403* balancing” to
 20 determine “the admissibility of evidence of time-barred acts,” *Id* at 1111, it would be inappropriate
 21 for this Court to strike Plaintiff's allegations of prior incidents of discrimination at this stage of the
 22 pleadings.

23 \\

24 \\

25

26

¹ *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977).

1 **IV. PLAINTIFF'S OPPOSITION TO
2 DEFENDANT'S MOTION TO DISMISS.**

3 **A. The Legal Standard for a 12(b)(6) Motion To Dismiss.**

4 As Defendant acknowledges, a Rule 12(b) motion based upon a failure to alleges facts upon
5 which relief may be granted, may only be granted if “it appears beyond doubt that the plaintiff can
6 prove no set of facts in support of his claim that would entitle him to relief.” Def’s Mot. at 5:4-6,
7 citing *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754 (9th Cir. 1994). Moreover, “all
8 allegations of material fact must be taken as true and construed in the light most favorable to the
9 nonmoving party.” Def’s Mot. at 5:2-4, also citing *Clegg v. Cult Awareness Network*, 18 F.3d 752,
10 754 (9th Cir. 1994).

11 What Defendant fails to inform this Court is that a Rule 12(b)(6) motion for failure to state
12 a claim “is viewed with disfavor and is rarely granted.” *Gilligan v. Jamco Develop. Corp.*, 108 F.3d
13 246, 249 (9th Cir. 1997)(emphasis added; internal quotes omitted). A 12(b)(6) dismissal is proper
14 only in “extraordinary” cases. *United States v. Redwood City* 640 F2d 963, 966 (9th Cir. 1981);
15 *Cauchi v. Brown*, 51 F.Supp.2d 1014, 1016 (E.D. CA. 1999); *United States v. White*, 893 F.Supp.
16 1423, 1428 (C.D. CA. 1995) Moreover, there is no justification for Defendant pursuing its motion
17 after Plaintiff offered to amend the complaint to address the deficiencies that Defendant asserted in
18 its motion. *Bennett v. Schmidt*, 153 F3d 516, 518 (7th Cir. 1998) (“Instead of lavishing attention on
19 the complaint until the plaintiff gets it just right, a district court should keep the case moving” by
20 requiring a more definite statement under Rule 12(e).).

21 **B. Plaintiff's “Time-Barred Allegations” Bear On His Discrimination Complaints.**

22 In the instant case, Plaintiff alleged that he was discriminated against as early as 2001 and
23 as late as 2007. Admittedly, a number of the specific instances of discrimination identified in
24 Plaintiff’s original complaint occurred outside the relevant statute of limitations period. However,
25 as discussed above, evidence of these “time-barred” incidents are nonetheless admissible to support
26 Plaintiff’s timely discrimination complaints. *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct.
27 1885, 52 L.Ed.2d 571 (1977); *National R.R. Passenger Corp. v. Morgan* 536 U.S. 101, 113, 122

¹¹ S.Ct. 2061, 2072 (2002); *Lyons v. England*, 307 F.3d 1092, 1109 (9th Cir. 2002).

C. Plaintiff Pled Sufficient Facts to State A *Prima Facie* Claim of Discrimination.

In his original complaint, Plaintiff listed a number of promotion decision for which he was not given equal consideration because of his national origin and because he complained about the discrimination to which he was being subjected. *See e.g.* Complaint ¶ 12. Admittedly, the original complaint did not make clear when these promotions took place. However, when **considered in the light most favorable to Plaintiff**, it can not be said that “**it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.**” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754 (9th Cir. 1994). In the course of normal discovery, Plaintiff would be able to establish (1) the dates of the promotions, a number of which occurred within the relevant limitations period, (2) that Plaintiff was the most qualified candidate, and (3) that those selected were not within Plaintiff’s protected class.

Moreover, Plaintiff's proposed amended complaint identifies a number of promotions within the relevant limitations period for which he was the most experienced and qualified candidate, but for which he was not selected. Instead, he makes clear in his proposed amended complaint, less qualified candidates who were not within his protected class were selected or, in some cases, the positions were left vacant. *See Amended Complaint ¶¶ 12, 23 & 25.*

Finally, Defendant admits that Plaintiff identified four positions in his original complaint during the relevant limitations period which he alleges he was denied due to discrimination and retaliation. *See Complaint ¶ 25.* Defendant asserts that Plaintiff's claims concerning these positions should be dismissed because Plaintiff "does not allege that the positions he applied for went to a member outside the protected class." Def's Mot. 8:4-9. Once again, the fact that those selected were not members of Plaintiff's protected class would be established during normal discovery. Accordingly, when **considered in the light most favorable to Plaintiff**, it can not be said that "**it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.**" *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754 (9th Cir. 1994).

1 Moreover, Plaintiff addresses this alleged deficiency in his Amended Complaint. *See* Amended
 2 Complaint ¶ 24.

3 **D. Plaintiff Pled Sufficient Facts to State a *Prima Facia* Claim for Retaliation..**

4 In his original complaint, Plaintiff alleged that Ms. Calhoun began putting negative material
 5 into his personnel file in retaliation for his complaints, after he complained in November, 2004,
 6 about the discrimination to which he was being subjected. *See* Complaint ¶ 15. Plaintiff also alleged
 7 that after he filed his original EEOC charge, he was subjected to continuing discrimination and
 8 retaliation, including being denied four (4) positions for which he was qualified. When **considered**
 9 **in the light most favorable to Plaintiff**, it can not be said that “**it appears beyond doubt that the**
 10 **plaintiff can prove no set of facts in support of his claim that would entitle him to relief.**”
 11 *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754 (9th Cir. 1994). In the course of normal
 12 discovery, the specific incidents of the continuing discrimination and retaliation about which
 13 Plaintiff complains would be identified. Moreover, Plaintiff provides clarification concerning the
 14 retaliation to which he was subjected in his proposed amended complaint. *See* Amended Complaint
 15 ¶¶ 14 & 23.

16 **E. Plaintiff Received Two “Right-to-sue” Letters from the DFEH.**

17 Defendant requests that this Court dismiss Plaintiff state law discrimination and retaliation
 18 claims on the ground that he failed to obtain “right-to-sue” letters from the California Department
 19 of Fair Employment & Housing (“DFEH”). *See* Def. Mot. 9:5-10:4. Defendant knew better. It was
 20 sent the same “NOTICE TO COMPLAINANT AND RESPONDENT” that Plaintiff received on
 21 or about January 11, 2006 and June 19, 2007, which were the DFEH “right-to-sue” letters concerning
 22 Plaintiff original and second discrimination and retaliation claims filed with that agency.. King Decl.
 23 Exh. 2. Moreover, a simple phone call to Plaintiff’s counsel or a request for a production of those
 24 letters would have obviated the need for this Court to waste judicial resources on this issue. Finally,
 25 Plaintiff specifically alleges that he received the requisite DFEH “right-to-sue” letters in his proposed
 26 amended complaint. *See* Amended Complaint ¶¶ 22 & 25.

27

V. CONCLUSION.

For the reasons set forth above, Plaintiff respectfully requests that this Court grant Defendant's motion for a more definitive statement and deny Defendant's motion to strike and to dismiss.

Dated: November 20, 2007

LAW OFFICES OF LAWRENCE J. KING

By: S/Lawrence J. King
Lawrence J. King
ATTORNEY FOR PLAINTIFF

1 LAWRENCE J. KING (CSB #120805)
2 6 "C" STREET
3 PETALUMA, CA 94952
4 PHONE: (707) 769-9791
5 FAX: (707) 769-9253

**4 ATTORNEY FOR PLAINTIFF
VAN A. PENA, PHD., M.D.**

**THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

S CASE NO. C 07-3870 CW
S
S DECLARATION OF LAWRENCE J.
S KING IN SUPPORT OF PLAINTIFF'S
S STATEMENT OF NON-OPPOSITION
S TO DEFENDANT'S MOTION FOR A
S MORE DEFINITE STATEMENT,
S STATEMENT OF NON-OPPOSITION
S TO DEFENDANT'S MOTION TO
S STRIKE THE PRAYER FOR PUNITIVE
S DAMAGES, AND OPPOSITION TO
S DEFENDANT'S MOTION TO STRIKE
S "TIME-BARRED ALLEGATIONS"
S AND OPPOSITION TO DEFENDANT'S
S MOTION TO DISMISS.

S Hearing Date: December 13, 2007
S Hearing Time: 2:00 p.m.
S Courtroom: 2, 4th Floor

S (The Honorable Claudia Wilken)

10

21 || I, Lawrence J. King, declare as follows:

22 1. I am Plaintiff Vincent Obiajulu's attorney of record in this case and I have personal
23 knowledge of the matters to which I declare herein and would be able to testify to the same if called
24 to do so before this Court.

25 2. Attached hereto as Exhibit 1 are true and correct copies of the emails that confirm
26 correspondence between myself and opposing counsel concerning Defendant's current motion.

1 3. Attached hereto are as Exhibit 2 are true and correct copies of the January 26, 2007
2 and the June 19, 2007, DFEH “right-to-sue” letters.

I declare under penalty of perjury under the laws of the State of California that the foregoing
is true and correct.

5 DATED: November 20, 2007 s/ Lawrence J. King

6

s/ Lawrence J. King

1 EXHIBIT 1A
2

3 Date: Wed, 14 Nov 2007 11:26:21 -0800 (PST)
4 From: "Lawrence King" <kingesq@pacbell.net>
5 Subject: Obiajulu v. San Mateo County
6 To: rswope@co.sanmateo.ca.us

7 Raymond:

8 Attached is the stipulation that we discussed. Please review and let me know if you have any
9 questions or proposed changes. If you and your client agree, I will e-file it with the Court once you
let me know that it is ok to do so.

10 Thanks.

11 Larry

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

1 EXHIBIT 1B

2 Date: Thu, 15 Nov 2007 16:13:37 -0800 (PST)
3 From: "Lawrence King" <kingesq@pacbell.net>
4 Subject: Obiajulu v. San Mateo County
5 To: "Claire Cunningham" <Ccunningham@co.sanmateo.ca.us>

6 Claire:

7 Attached is the First Amended Complaint. I believe it address the points raised in your motion. For
8 instance,

- 9 1. it sets forth specific instances of discrimination and retaliation occurring in the relevant time
10 period;
11 2. it sets forth that my client received "right-to-sue" letters from the DFEH concerning both of his
12 charges;
13 3. it eliminates any claim for gender discrimination; and
14 4. it eliminates the request for punitive damages.

15 Please let me know by the end of the business day tomorrow whether or not you are willing to
16 withdraw your motion in light of the amended complaint.

17 Thanks.

18 Larry King

19 Claire Cunningham <CCunningham@co.sanmateo.ca.us> wrote:

20 Dear Mr. King:

21 This will confirm our telephone conversation this morning in which I explained that we cannot
22 agree to your proposed stipulation without reviewing the amended complaint. If your amended
23 complaint adequately addresses the issues raised in our motion to dismiss/strike, we would agree to
24 withdraw our motion, but it isn't possible for us to make that decision without first reviewing the
25 amended complaint. Please feel free to contact me if you have any further questions.

26 27 Very truly yours,

28 Claire Cunningham
29 Deputy County Counsel
30 Telephone: (650) 363-4795
31 ccunningham@co.sanmateo.ca.us

1 EXHIBIT 1C

2 Date: Fri, 16 Nov 2007 14:20:34 -0800
3 From: "Claire Cunningham" <CCunningham@co.sanmateo.ca.us>
4 To: "Lawrence King" <kingesq@pacbell.net>
5 CC: "Raymond Swope" <RSwope@co.sanmateo.ca.us>
6 Subject: Obiajulu v. San Mateo County

7 Larry:

8 While we appreciate your decision to eliminate the improper gender-related claims and the request
9 for punitive damages, the draft amended complaint fails to remedy the other deficiencies set forth
10 in our motion to dismiss/strike. Most notably, you did not delete the time-barred allegations or
11 allege facts sufficient to state causes of action against the County under either Title VII or the FEHA.
Consequently, we cannot agree to your proposed stipulation and will await the court's decision on
our motion.

12 Best regards,

13 Claire A. Cunningham
14 Deputy County Counsel
Telephone: (650) 363-4795
ccunningham@co.sanmateo.ca.us

15

16

17

18

19

20

21

22

23

24

25

26

27

1 EXHIBIT 2
2 [Hard copies of the January 26, 2007 and the June 19, 2007, DFEH
3 "right-to-sue" letters are attached to the Court's courtesy copy]
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28